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81-2186
No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

M. R. YUDOFSKY & ASSOCIATES, a Kentucky Partnership, and
MORRIS R. YUDOFSKY & ASSOCIATES, another Kentucky Partnership, - - Petitioners,

versus

COMMONWEALTH OF KENTUCKY, DEPARTMENT OF FINANCE, - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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May 25, 1982

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QUESTIONS PRESENTED FOR REVIEW

Where the Commonwealth of Kentucky allowed a private developer, as a condition precedent to the developer's proceeding with his own private project, to select Petitioner's and other's property as the site for a state garage and office building, which selected site:

(1) Was contrary to that recommended by the State commissioned expert study for location of state parking garage;

(2) Was contrary to that recommended by the State commissioned expert study for the location of a state office building;

(3) Was not blighted nor deteriorated, and the State never contended that it was, and

(4) Was selected in order to provide a straight line pedway from the private developer's new project to the State owned Commonwealth Convention Center:

Was the taking for a public use?

Petitioners say NO and that this "deal" between the Commonwealth of Kentucky and the private developer deprived the Petitioners of their property without due process of law.

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v.

COMMONWEALTH OF KENTUCKY, DEPARTMENT OF FINANCE, - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioners, M. R. Yudofsky & Associates, a Kentucky Partnership, and Morris R. Yudofsky & Associates, another Kentucky Partnership, respectfully pray that a Writ of Certiorari issue to review the Opinion of the Court of Appeals of Kentucky rendered on September 4, 1981.

OPINIONS BELOW

The Opinion of the Court of Appeals of Kentucky (not to be published) appears in the Appendix hereto. The Findings of Fact and Conclusions of Law rendered by the Jefferson Circuit Court also appears in the Appendix hereto.

JURISDICTION

The Judgment of the Jefferson Circuit Court taking the three story building owned by Petitioner was entered on December 10, 1979, and amended and modified on December 17, 1979. The Judgment taking the ten story office building owned by the other Petitioner was entered January 21, 1980, and amended and modified on November 20, 1980. The two cases were consolidated at the Kentucky Court of Appeals; and on September 4, 1981, the Opinion of the Court of Appeals was rendered. A timely petition for rehearing was denied on November 25, 1981. A timely Motion for Discretionary Review was denied by the Supreme Court of Kentucky on March 2, 1982. This Court's jurisdiction is invoked under *28 USC 1257*.

Appeal is permissible where the ruling is fundamental to the future conduct of the case. *Forgay* v. *Conrad,* 6 How. 201, 204, 47 U. S. 201, 204, 12 L. Ed. 404 (1848).

> And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further

decree the accounts between the parties pursuant to the decree passed.

In accord is *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 136, 46 S. Ct. 52, 70 L. Ed. 195 (1925).

The Judgment was final on the question of power to take in Kentucky, *Ratliff* v. *Fiscal Court of Caldwell County*, Ky., 617 S. W. 2d 36, 39 (1981).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution:

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, § 1, to the Constitution:

AMENDMENT 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KENTUCKY STATUTES INVOLVED

KRS 247.140:

247.140 Functions of Fair Board

(1) The state fair board:

(a) Shall have the custody and control of such property as now is under its custody and control, and of such property as may hereafter be placed under its control or transferred to it by the state property and buildings commission, for any purposes mentioned in this section and the physical properties so under its custody and control or transferred to it are hereinafter referred to in this section, and in KRS 247.150 and 247.160, as the "state fairgrounds and an area in a city of the first class to be used as an exhibition center."

(b) May erect and repair buildings on the state fairgrounds and exhibition center, make any and all necessary or proper improvements, and generally carry on a program of development and extension of facilities designed to accomplish the objects defined in this section.

(c) Shall promote the progress of the state and stimulate public interest in the advantages and development of the state by providing the facilities of the state fairgrounds for agricultural and in-

dustrial exhibitions, public gatherings, cultural activities, and other functions calculated to advance the educational, physical and cultural interests of the public and by providing the facilities of the exhibition center for conventions, trade shows, public gatherings and other functions calculated to advance and enhance the visitor industry, economy, entertainment, cultural and educational interests of the public.

(d) May hold an annual fair on the state fairgrounds, for the exhibition of agricultural, mechanical, horticultural, dairy, forestry, poultry, livestock, mineral, and all other industrial interests of the state, and prepare premium lists and establish rules of exhibition for the fair.

(e) May purchase liability insurance for the members and executive officers exempted from the classified service of the state by KRS 18.140.

(2) The state fair board may take, acquire and hold property, and all interest therein, by deed, gift, devise, bequest, lease, or eminent domain, or by transfer from the state property and buildings commission, and may dispose of any property so acquired in the manner provided by law. In the exercise of its power of eminent domain it shall proceed in the manner provided in the Eminent Domain Act of Kentucky.

KRS 177.081:

177.081 Authority of bureau of highways to condemn land and materials; title to property; conclusiveness of official order

(1) The Commonwealth of Kentucky, bureau of highways, when it has, by official order, desig-

nated the route, location or relocation of a highway, limited access highway, bridge, roadside park, borrow-pit, quarry, garage or other property or structure deemed necessary for the construction, reconstruction, or maintenance of an adequate system of highways, may, if unable to contract or agree with the owner or owners thereof, condemn the lands or material, or the use and occupancy of the lands designated as necessary. All property acquired by the Commonwealth of Kentucky, bureau of highways, shall be in fee simple whenever so specified in the petition filed in the action. The official order of the bureau of highways shall be conclusive of the public use of the condemned property and the condemnor's decision as to the necessity for taking the property will not be disturbed in the absence of fraud, bad faith, or abuse of discretion.

(2) The proceedings for condemnation shall be as provided in the Eminent Domain Act of Kentucky.

STATEMENT OF THE CASE

In 1977 the Commonwealth of Kentucky built a convention center in Louisville, Kentucky, which faces Fourth Street and extends from the south side of Market Street to the north side of Jefferson Street. In 1978 a Hyatt Hotel was constructed to the south on Fourth Street from the south side of Jefferson Street to the north side of Liberty Street and connected to the Commonwealth Convention Center by an elevated pedway across Jefferson Street. Only the site selected by

the private developer on Petitioners' property would accommodate a straight line pedway from his new hotel to the Commonwealth Convention Center and establish parity of pedways with the Hyatt Hotel. See Petitioners' diagram, Appendix.

Petitioners are Kentucky partnerships which respectively own a three story storefront and a ten story office building on the northeast corner of Fourth and Market Streets, Louisville, Kentucky. These properties are not blighted or deteriorated and were not a part of the Riverfront Development Project, Kentucky R. 19 (Tr. 113-114, qs. 30-36).

The Commonwealth of Kentucky, acting through its then governor, Julian M. Carroll, made an agreement with local developer, Al J. Schneider (Galt House, Inc.), that if Schneider would buy the Urban Renewal land at Fourth and Main Streets and build a new hotel complex (Riverfront, aka Shippingport Square), that the State in return would build a parking garage on a site selected by Schneider with a straight line pedway connecting Schneider's new development with the Commonwealth Convention Center (owned by the Commonwealth of Kentucky) (deposition of Governor, p. 36, q. 94) (Tr. pp. 19-22).

The Governor told Russell McClure, his Secretary of Finance from April, 1976, through July, 1978 (Tr. p. 65) (hereinafter referred to as McClure) that the garage was to be adjacent to the Convention Center, north of the Convention Center, in the block of Third, Fourth, Main and Market Streets (deposition of Governor, p. 45) (Tr. pp. 65-68, qs. 3-8). McClure in-

structed the architects, Messrs. Weis and Nolan, and Mr. Clark Beauchamp, Commissioner of Facilities Management (hereinafter referred to as Beauchamp), that the garage would be built in the block of Third, Fourth, Main and Market Streets and attached to the Convention Center by pedway because those were the instructions of the Governor (Tr. p. 137, Exhibits #19, #22, #23, #24, #25, #26, #29, and #30).

At the Urban Renewal (UR) meeting April 29, 1977 (Tr. pp. 23-24, 27), Schneider referred to a deal with State Government to build the garage upon the west end of the block bounded by Main, Market, Third and Fourth Streets, including Petitioners' property. He said the garage must not be built elsewhere because it could not then connect his project by a walkway to the Commonwealth Convention Center, that he had told the Governor several months ago that he would not touch Riverfront unless a garage and office building was built at the site selected by him. He said he could start promptly on Riverfront, but intended to hold off until the garage controversy was settled, and he would cancel the whole Riverfront project if the garage was not built or was built in an inconvenient site. His ultimatum was, "*It's this simple, they either want a Riverfront or they don't.*" The Courier-Journal & Louisville Times published the remarks of Schneider (Tr. pp. 236-239; pp. 256-257) (emphasis added).

UR, by resolution, delivered land for his new project to Schneider with the stipulation that he had the approval rights of the site for the garage, etc.; and if he did not approve of the site, then his money (except

for five percent deposit) was refundable (Tr., Exhibit #9, par. 10).

Minutes of UR meeting of April 29, 1977:

> He submitted his check to the Agency for $425,000 which is the balance of the money necessary for the purchase price of the entire site. *He had one reservation, which the Commission approved, and that was he would not build on a site known as Shippingport Square, if the State did not build their garage in a satisfactory location to him in the block bounded by 4th, 3rd, Main and Market. There was a general discussion concerning this and THE BOARD BY RESOLUTION CONCURRED IN DELIVERING LAND TO MR. SCHNEIDER WITH THE STIPULATION THAT HE HAD THE APPROVAL RIGHTS OF THE SITE FOR THE GARAGE, ETC., AND IF HE DID NOT APPROVE THE SITE THEN HIS MONEY WAS REFUNDABLE WITH THE EXCEPTION OF THE NORMAL FIVE PERCENT DEPOSIT.* Motion was made by Mr. Triplett and seconded by Mrs. Reynolds approving the above. Voting was unanimous. (Emphasis added)

The deal was expressed in writing by the contract of sale, Urban Renewal to Schneider (the redeveloper) dated June 8, 1977 (Tr., Exhibit #2, p. 5):

> It is understood between the parties, as reflected in the minutes of the Agency dated April 29, 1977, that *the Redeveloper's final commitment hereto is predicated upon commitment for construction by the Commonwealth of Kentucky, or an agency*

thereof, of a parking garage and elevated pedestrian walkway connecting the Project with the Commonwealth Convention Center and SAID PARKING GARAGE IN A MANNER SATISFACTORY TO THE REDEVELOPER: . . . (Emphasis added)

At the Urban Renewal meeting held February 2, 1978, Schneider repeated the substance of his deal and stated that when the State broke ground for the garage, he would then be ready to commence Riverfront. McClure was present and said that the State hoped to break ground in June, 1978. McClure also requested Urban Renewal to formally contract to act as the agent of the State to purchase the property Market to the south, Main to the North, along Fourth Street. McClure stated that if the individuals would not sell, then the State would take the property by eminent domain (Tr. p. 75).

Paragraph 1 and 2 of the minutes of the Urban Renewal meeting held February 2, 1978 (Tr., Exhibit 12, p. 1, 2) reads:

1. Final approval of plans for Mr. A. J. Schneider's development of the office-hotel apartment complex to be built on the Shippingport Square tract of land bounded by Third, Fourth and Main Streets and River Road. Mr. Schneider presented to the Board his final development plans and a model of what he proposes to develop and gave a detailed description of his proposal. *He also stated that when the State breaks ground for the garage that he will then be ready to begin his development. Mr. Russell*

McClure, State Secretary of Finance and Administration stated that the State hopes to break ground in June. Motion was made by Mrs. Reynolds and seconded by Mrs. Byck approving the above. Voting was unanimous. Mayor William B. Stansbury also voted yes.

2. *Request by the State for the Urban Renewal and Community Development Agency to acquire the property for the new Commonwealth Parking Garage for the State and handle the relocation. Mr. Russell McClure, State Secretary of Finance and Administration made the request for the Urban Renewal Agency to enter into a contract with the State to negotiate with the property owners for the property market to the south, main to the north, along Fourth Street, back to Bensinger's for the State's parking garage, and to do the relocation work and other work necessary to acquire the site for the State. Mr. McClure stated that if negotiations with an individual property owner could not be worked out, then the State would use its right of eminent domain to buy the property. The State is hopeful that ground can be broken by June.* . . . (Emphasis added)

The garage did not originally include plans for a state office building, September, 1978 (Tr. p. 70, q. 15; Exhibit #4). However, the requirements of the Federal Environmental Protection Act would not permit a garage for more than 750 cars at that location (Tr. p. 173, q. 10). The problem was stretching a parking structure limited to 750 cars from Fourth and Market to Fourth and Main to support a pedway connecting

Convention Center to Schneider's Riverfront project. The solution—add a state office building on the northeast corner of Fourth and Main.

On February 7, 1978, Mr. Don Johnston, Executive Director of the Fair Board, appeared at a joint meeting of the Executive Committees' Appropriations Committee of the General Assembly. He asked that they provide 22½ million dollar bond authorization for the Fair Board, 8½ million of which was to be for the garage and office building. The office building would be approximately 65,000 square feet. When challenged by a member, he stated that the purpose of the office building would be to encourage the use of the Convention Center and downtown generally by providing space for Louisville Central Area, Chamber of Commerce, tourists' bureaus and other quasi-government entities (Tr. pp. 151-152; R. p. 110).

On March 29, 1978, the bond authorization requested by the Fair Board was approved (Kentucky Budget 1978-1980).

On May 18, 1978, the Fair Board approved the preliminary design and requested the architect to proceed with the project (Tr. Exhibit #31).

On May 26, 1978, Beauchamp approved a fee of $303,000 to the architect for their services on the project (Tr. Exhibit #22), the same architect who was doing Riverfront for Schneider (Tr. p. 42).

On May 31, 1978, the architect (Tr., in Paragraph 14 of Exhibit #23) pointed out that the Commonwealth Convention Center had not been planned for installation of a pedway at Fourth and Market Streets.

The Finance Department, by its letter dated August 3, 1979, directed, *at the expense of the Commonwealth,* its consulting engineers:

> . . . to proceed in providing additional survey information for the location of utilities, power poles, street lights, and other items for an area of Main Street extending from the proposed State Office Building to the property of Mr. Al Schneider on the north side of Main Street.
> (Tr. Exhibit #38)

McClure took leave of absence and resigned from State Government effective December 1, 1978. He went to work immediately thereafter as a consultant to Schneider (Tr. p. 51).

On April 11, 1979, the Finance Department requested Johnston to forward a letter of acceptance and approval of the garage, aka Parking Structure II (Tr. Exhibit #41, penultimate paragraph).

On August 22, 1979, Johnston wrote the Governor's Office that the State Fair Board would not be responsible for the State Office Building because:

> . . . it would exceed the Fair Board's proposed bond issue for capital improvements by seven million dollars plus the fact that the operation and responsibility for the office building is not in keeping with the functions and programs of the Fair Board.
> (Tr. Exhibits #32 and #37)

Johnston testified that the then projected costs of the garage, aka Parking Structure II, was 15½ million dollars (Tr. p. 156-157).

Governor Carroll (deposition of Governor, p. 8), McClure (Tr. pp. 90-91), and Beauchamp (Tr. pp. 173, 191-197, qs. 69-85) testified that the garage, aka Parking Structure II, was of size and located at site recommended by SUA, Inc. (1977) (Tr., Exhibit #39), and Voorhees Studies (1975) (Exhibit #40; Tr. p. 283, qs. 46).

The SUA, Inc. Study (Tr. Exhibit #39, pp. 5-14) recommended that the Commonwealth build an office building of 203,000 square feet at or adjacent to the site of the State Office Building presently located at Sixth and Cedar Streets, Louisville, Kentucky, some blocks away from the site selected by Schneider.

The Voorhees Study, which was entitled, "Parking Demand Analysis, Commonwealth Convention Center, Louisville, Kentucky," (Tr., Exhibit #40, p. 34 and fig. 2-3) recommended the site of the State parking garage be east of the Hyatt Hotel, far from the site selected by Schneider.

The Commonwealth of Kentucky, at Schneider's behest, entirely disregarded the recommendations (203,000 square feet at Sixth and Cedar Streets, adjoining and connected to the existing State Office Building) of the SUA, Inc. Study in favor of building a 98,000 square foot building (Tr. p. 131, q. 46) at Fourth and Main Streets. Contrary to the Voorhees Study, the Executive Branch never considered any site for the garage except along the western side of the block bounded by Third/Fourth, Main/Market Streets, all at Schneider's behest (deposition of Gov-

ernor, p. 27, q. 65; p. 29, q. 71; pp. 44-45, qs. 122-124; p. 47, q. 131).

All of the Governor's horses and all of the Governor's men marched to the foregone conclusion, which was that Parking Structure II, despite the studies, would be s-t-r-e-t-c-h-e-d with a pedway along the western side of Fourth Street "in a manner satisfactory" to Schneider.

The course of conduct of the Commonwealth of Kentucky, its employees, Chief Executive Officer, and Schneider prove a unity of purpose with a common design and undertaking to deprive Petitioners of their right, (1) to own property, and (2) to be free from the exercise of arbitrary power.

The raison d'etre for the garage and office building at the site demanded by Schneider is to make his properties, like the Hyatt Regency to the south of the Commonwealth Convention Center, connect by pedway to the Convention Center. *The Commonwealth of Kentucky, in accordance with the deal, restricted the site to that selected and demanded by Schneider.*

The public use was purported, but not actual. The primary purpose of this attempted taking is for private use, and any public use resulting therefrom is merely incidental.

FEDERAL QUESTIONS RAISED

The Petitioners, in the courts of first instance raised the Federal questions of Fifth Amendment and due process by their answers (Commonwealth v. M. R.

Yudofsky & Associates, R. 41-43, and Commonwealth v. Morris R. Yudofsky & Associates, R. 31-33). Petitioner advised the trial court in their opening statement (Commonwealth v. M. R. Yudofsky & Associates, Tr. 9 and 10) that those rights had been violated, and in their brief before the same court made the same contention. Petitioner raised those same contentions by Motion for Summary Judgment (Commonwealth v. Morris R. Yudofsky & Associates, R. 65-67).

Petitioners, in their Statement of Appeal and briefs (original brief, reply brief, petition for rehearing), all before the Court of Appeals of Kentucky, raised and argued those Federal questions.

Petitioner, in its Motion for Discretionary Review (p. 13 thereof) to the Supreme Court of Kentucky, stated, "Movant is being deprived of its property in violation of the Kentucky Constitution and Amendments 5 and 14 of the United States Constitution."

In Commonwealth v. M. R. Yudofsky & Associates, the trial judge, in its Findings of Fact and Conclusions of Law contained in the Appendix hereto, held that:

> The proposed parking garage will be constructed and operated by the Commonwealth of Ky. under the auspices of the State Fair Board for the primary benefit of the Commonwealth Convention Center and amounts to a valid public use.
>
> The proposed parking garage remains within the original proposals as to purpose and use unhindered by whatever action is ultimately taken in regard to the proposed state office building.

In Commonwealth v. Morris R. Yudofsky & Assoc., the trial judge, since retired, entered the Interlocutory Order (R. pp. 11-12) without an evidentiary hearing. The successor trial judge entered a final judgment (appendix hereto) providing that possession would remain in the Petitioner until its appeal was the subject of an appellate ruling; the Court of Appeals of Kentucky, in its Opinion (not to be published) (Appendix hereto), concluded that it was bound by the findings of the lower court unless they were clearly erroneous; and after examining the evidence, it could not find that the lower court was clearly erroneous. It specifically held:

> Consultation between private enterprise and government to effect for the common good is not evil, per se, and should be encouraged as long as there is no abuse.

The Supreme Court of Kentucky, by its Order entered March 2, 1982, denied Petitioners' Motion for Discretionary Review (Appendix hereto).

ARGUMENT

The writ should be allowed because:

1. The trial judge (Commonwealth v. M. R. Yudofsky & Associates, Tr. Vol. II, pp. 276-278, q. 24) erroneously thought that *KRS 247.140(2), Functions of Fair Board,* created a presumption in favor of the condemnor's decision:

THE COURT: The case law says the court can take judicial knowledge. In most instances the property owners oppose the State taking their property to put a highway over it, but, so what. The remedy is, the constitutional mandate is, as far as that goes, that they receive just compensation for the property taken, *but that doesn't stop the State from taking it.*

(Emphasis added)

Only *KRS 177.081, Authority of bureau of highways to condemn land and materials; title to property; conclusiveness of official order,* provides that when the Bureau of Highways has designated the location of a highway, its order "shall be conclusive of the public use" and "the condemnor's decision as to the necessity for taking the property will not be disturbed in the absence of fraud, bad faith, or abuse of discretion." *There are no such presumptions in KRS 247.140 (Fair Board).*

Both *KRS 177.081* (Highway Department) and *KRS 247.140* (Fair Board) were enacted by the same session of the Kentucky Legislature and both effective the same date, June 19, 1976. *It is obviously significant that the Legislature saw fit to arm the Highway Department with the presumption of validity of public use and site selection and deny such presumption to takings initiated for the benefit of the Fair Board.*

The trial court erroneously relied upon highway department cases (Findings of Fact and Conclusions of Law dated December 10, 1979, in Appendix). The

Findings of Fact and Conclusions of Law of the trial court were clearly erroneous.

2. Under the United States Constitution, Amendments 5 and 14, the Petitioners should prevail.

In the process of Respondent bartering away Petitioners' property, Schneider, with no status other than that of a private individual, was delegated "approval rights" as to the site of Parking Structure II. This is illegal because:

It constituted an illegal delegation to Schneider of power which is vested solely in the Commonwealth and which may not be delegated to a private individual, that is, the determination as to which private individual's property must be surrendered to the Commonwealth.

Eminent domain is an attribute of sovereignty and may not be delegated to a private individual, as was done here.

See *Washington* v. *Roberge,* 278 U. S. 116, 123, 49 S. Ct. 50, 73 L. Ed. 210 (1928).

3. THE COURTS IGNORED THE ONLY DECISION ON POINT.

REEL v. *CITY OF FREEPORT,* Ill., 209 N. E. 2d 675 (1965), IS ON "ALL FOURS" WITH THE CASE AT BAR.

Compare the facts:

Reel v. *Freeport*	*Kentucky* v. *Yudofsky*
1. City of Freeport to sell its parking lot to Montgomery Ward.	1. Schneider to buy Fourth and Main Streets from Urban Renewal.
2. Montgomery Ward to erect a large retail store.	2. Schneider to build hotel, apartments and offices at Fourth and Main instead of Sixth and Main.
3. City of Freeport would acquire Reel's property across the street from Ward's new store.	3. Kentucky would acquire Yudofsky's property and others along western side of Fourth Street in straight line from Fourth and Main to Commonwealth Convention Center.
4. City of Freeport would own and use Reel's property as a City parking lot.	4. Kentucky would use property as parking garage and office building to accommodate straight line pedway from Schneider's Fourth and Main project to Commonwealth Convention Center.

The holding was that the facts plead were an abuse of discretion. Neither the Opinion of the trial court nor that of the Court of Appeals have addressed the only case cited directly and squarely in point.

4. The State may not deprive owners of their property and compel a jury trial on value unless the condemnation is for a public use.

5. Where, as here, the condemnation power is exercised in a way that benefits a specific and identifiable private interest, the court should inspect with height-

ened scrutiny the claim that the public use is the predominant interest being advanced.

6. The rightfulness of these takings has been and still is a question of great public interest and wide publicity. *KRS 247.140(2)* does not create a presumption in favor of the condemnor's decision as to public use or site selection. Publication of an opinion safeguarding the right of persons to own property will help restore confidence in government.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Opinion of the Court of Appeals of Kentucky.

Respectfully submitted,

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